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CITATIONS

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

FIRST NATIONAL CITY BANK

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in the above-entitled case.

OPINIONS BELOW

The opinion of the district court (R. 6a–10a) is reported at 210 F. Supp. 951. The opinion of the panel of the court of appeals (Appendix A, *infra*, pp. 21–44) is reported at 321 F. 2d 14. The opinion of the court of appeals, sitting *en banc* (Appendix B, *infra*, pp. 45–46), is not reported.

JURISDICTION

The judgment of the court of appeals, sitting *en banc*, was entered on January 13, 1964 (Appendix C, *infra*, pp. 47–48). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTIONS PRESENTED

1. Whether, prior to service of process on the taxpayer in an action to collect taxes, the district court has the power to issue an injunction *pendente lite* prohibiting third parties within the jurisdiction from disposing of the taxpayer's property even though the property may be located outside the jurisdiction.

2. Whether a bank deposit in a foreign branch of a New York bank, collectible in New York if payment is refused at the branch, is subject to tax lien foreclosure in the district of the home office.

STATUTES INVOLVED

Sections 6321, 7402(a) and 7403(a) of the Internal Revenue Code of 1954 and Section 1655 of 28 U.S.C. are set forth in Appendix D, *infra*, pp. 49–51.

STATEMENT

Omar, S.A., is a Uruguayan corporation. (R. 11a). On October 31, 1962, the Commissioner of Internal Revenue made jeopardy assessments against Omar, totalling approximately $19,300,000. These assessments were on account of personal holding company tax liabilities found to have been incurred but unpaid with respect to income realized by Omar from sources within the United States, during its fiscal years

March 31, 1955, through March 31, 1961.[1] (R. 12a–14a.) On the same day, the First National City Bank (respondent), was served with notice of levy and notice of the federal tax lien (R. 31a).

Concurrently, the United States commenced an action in the United States District Court for the Southern District of New York naming, as defendants, Omar, S.A., Lazard Freres & Co., Lehman Brothers, Belgian-American Banking Corp., Belgian-American Bank & Trust Co., First National City Bank (respondent in this case), and First National City Trust Co. (R. 11a.) The complaint alleged, *inter alia*, that respondent had "substantial sums of money for, for the account of, or for the credit of, Omar * * *." (R. 15a–16a.) Personal jurisdiction over respondent was acquired by service of process (R. 8a) but Omar has not yet been served.

The complaint requested that the district court determine that Omar was indebted to the United States for taxes, interest and penalties in the amount of the assessment; that the court foreclose the tax lien of the United States upon all of Omar's property and rights to property, including sums held for the account or credit of Omar in foreign branch offices of the defendant-banks; and that it grant such "further relief that it deems is just, equitable and proper."

[1] Omar failed to pay these assessments. (R. 6a–7a, 12a–14a, 16a.) On May 20, 1963, Omar petitioned the Tax Court for a redetermination of these deficiencies. Docket No. 2041–63. No decision has been rendered in that proceeding. Since a jeopardy assessment is involved here, collection is authorized despite the pendency of Tax Court proceedings. See Section 6213(a), Internal Revenue Code of 1954.

The complaint also requested that, pending the determination of the action, the court enjoin the defendants from transferring any property or rights to property held for the account of Omar. (R. 15a–17a.)

Affidavits by several internal revenue agents were filed in support of the application for injunctive relief showing the following facts (R. 22a–30a): The possible existence of a tax delinquency first came to the attention of the Internal Revenue Service in 1959, when Omar filed its first and only tax return. (R. 25a–26a.) Because the return was incomplete, additional information about the corporation was requested. This information was not supplied. (R. 22a–25a.)

Thereafter, the internal revenue agent conducting the examination informed Omar that he proposed to make a determination of Omar's tax liability on the basis of information at hand. (R. 23a.) The Internal Revenue Service later learned that in June 1961, a director of Omar came to the United States and commenced to liquidate Omar's assets in the United States. (R. 23a.) The records of Lehman Brothers, a brokerage house of which Omar was a customer, disclose that in December 1961, Omar withdrew $500,000 from its account there. A notation opposite the withdrawal states: "Check to 1st National City Bank." (R. 29a.) The records of Lazard Freres & Company, another brokerage house which held securities for Omar, reveal that in the same month $1,640,000 was paid to Omar with the notation: "Transfer by wire to 1st National City Bank of

n y [sic] Montevideo credit for your acct." (R. 27a.) In the same year $400,000 was transferred from Omar's Lazard Freres account to the Montevideo branch of the Belgian-American Banking Corporation (another of the original defendants) for the account of Omar (R. 27a), and $800,000 was transferred from Omar's account with Abraham & Company, another New York brokerage house, to the same Montevideo account. (R. 28a.) There was other evidence that Omar was removing its assets from the United States. (R. 23a–30a.)

On October 31, 1962, the district court issued a temporary restraining order (R. 6a) and, after a hearing, filed an opinion (R. 6a–10a) which found in part (R. 7a):

> The affidavits of the plaintiff show an intent to liquidate, and in fact, substantial liquidations of the defendant Omar's accounts within the United States and transfer of the proceeds outside of the territorial jurisdiction have occurred. It therefore appears that there is a clear and present danger that plaintiff may be unable to recover upon defendant Omar's tax liability.

Accordingly, on the basis of its "personal jurisdiction over the officers of the bank within the United States" (R. 8a–9a), the district court concluded it should exercise its "equitable power to issue a preliminary injunction so as to prevent irreparable injury pending

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the determination of an action." (R. 7a–8a.)[2] It thereupon ordered (R. 5a):

> that pending the determination of this action or until further order of this Court, the defendants, * * * First National City Bank of New York * * * be and they are hereby restrained from * * * disposing of * * * any property or rights to property of Omar, S.A., * * * now held for or for the account of the said Omar, S.A., by them or by any of their branches, agents, or nominees whether located within the United States or not and whether their branches, agents, or nominees are located within the United States or not.

The court's opinion observed that if compliance with the injunction were shown to violate foreign law, the injunction would be modified (R. 8a–9a).

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[2] Subsequently, on a satisfactory showing by Belgian-American Banking Corporation and Belgian-American Bank and Trust Co. that they had no accounts or other property of Omar in the United States or abroad, the complaint was dismissed as to them with the consent of the United States. On prior similar showings by defendants Belgian-American Bank and Trust Co. and First National City Trust Co., they were not included in the order for the preliminary injunction. (R. 9a.) Respondent, in opposing the motion for a preliminary injunction, filed an affidavit by one of its vice-presidents which affirmatively stated that Omar was not a depositor of the bank at its head office or any domestic branch, but which neither affirmed nor denied that Omar was a depositor at any of the bank's foreign branches. (R. 31a–32a.) The location and other details of Omar's foreign branch accounts, if they exist, now await further clarification in the district court, pending disposition by this Court of this petition for certiorari.

Respondent appealed from the issuance of the preliminary injunction. (R. 33a–34a.) A three-judge panel of the court of appeals reversed the district court, Judge Hays dissenting. (Appendix A, *infra*, pp. 21–44.) The majority reasoned that since the district court did not yet have personal jurisdiction over Omar, it could proceed only with reference to such of Omar's property as was located within its jurisdiction. The court concluded that deposits held by respondent which were "collectible [by Omar] only outside the United States" (R. 53a) were not property within the jurisdiction of the district court. This followed, said the court, because the rights of the United States, by virtue of its tax lien, were no greater than Omar's rights, and Omar could not have brought suit in New York to collect deposits payable abroad unless it had demanded and been refused payment at the counters of the foreign branch. On rehearing *en banc* the court of appeals again reversed the district court by a vote of 4-to-3.[3]

REASONS FOR GRANTING THE WRIT

1. The decision of the court of appeals in this case severely hampers the Internal Revenue Service in its expanding efforts to collect delinquent taxes from nonresident aliens and American citizens residing abroad. Such persons not infrequently frustrate col-

[3] Judge Kaufman did not participate in the rehearing. Judge Clark died after argument but before announcement of the decision. It was noted that he had indicated his intention to vote for affirmance of the district court. An equal division would have resulted in affirmance. *Farrand Optical Co.* v. *United States*, 317 F. 2d 875, 885–886 (C.A. 2).

lection of the taxes which they have incurred by liquidating their American assets and transferring the proceeds to foreign branches of United States banks, brokerage houses, and other financial institutions. As soon as a taxpayer has ordered the transfer, the proceeds, by contract, become payable at the counters of the foreign branch. The United States seeks the power to freeze such funds before they are paid to the taxpayers abroad. The decision below effectively bars this remedy within the Second Circuit, which includes the Nation's principal financial center. The court holds that all funds which by contract are payable abroad are beyond the jurisdiction of the district court and thus cannot support an action *quasi in rem* to foreclose a federal tax lien.[4] And it rules additionally that the United States is not entitled to an injunction barring the transfer of funds located beyond the jurisdiction of the district court prior to service of process upon the delinquent taxpayer, even though the assets are likely to be dissipated during the time it takes for the United States to serve process and to establish the validity of that service in litigation.

The court of appeals' opinion creates evident temptations and possibilities for evasion. It is anticipated that in the near future the decision will assume even greater significance. The Internal Revenue Service has recently embarked upon an expanded audit program of all international tax matters within its juris-

[4] In dictum the court of appeals also stated that such property is not subject to levy. (Appendix A, *infra*, pp. 37–38.)

diction. Statutory authority has been granted which will make it possible to secure detailed information returns concerning certain foreign corporations.[5] As a consequence, it is predictable that large additional unpaid tax liabilities will be discovered and that in many instances the assets necessary to satisfy these liabilities will have been transferred from the United States to (and will be payable at) foreign branches of United States financial institutions. The amount of these liabilities should be substantial. The present case alone involves more than $19,000,000, of which some $2,140,000 may be on deposit in respondents' foreign branches.

The preliminary injunction granted by the district court would simply maintain the *status quo* by barring the transfer of those funds which are payable at foreign branches of the respondent and are held for the account of Omar. Its purpose is to preserve them to satisfy any judgment, whether personal or *quasi in rem*, which may be entered against Omar at the conclusion of this action. By the same token, if the preliminary injunction is dissolved, satisfaction of the judgment from these funds will prove difficult if not impossible.

2. In this proceeding, the United States may be able to secure a judgment against Omar either by obtaining personal jurisdiction over that corpora-

[5] Section 6046 of the Internal Revenue Code of 1954, as amended by Section 20(b) of the Revenue Act of 1962, P.L. 87-834, 76 Stat. 960. See Fox, *Reporting Requirements on Foreign Activity Under the Revenue Act of 1962*, 42 Taxes 215 (April 1964).

tion[6] or by foreclosing its lien upon Omar's property within the district. Personal jurisdiction over Omar may be secured by service of process under Section 302(a) of the New York Civil Practice Law and Rules, 7B McKinney's Consolidated Laws of New York Annotated, which confers personal jurisdiction over a corporation "as to a cause of action arising from" the transaction of business within New York.[7] Alternatively, jurisdiction will be secured if Omar makes a general appearance in the action to defend on the merits in order to protect property over which the district court concededly has jurisdiction.[8] The court of appeals seems to have assumed that an injunction barring a transfer of all of the taxpayer's property would have been proper once personal jurisdiction was established. It did not, however, explain

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[6] Omar could then be ordered to transfer the funds on deposit to the United States. See *United States* v. *Ross*, 302 F. 2d 831 (C.A. 2d). If it refused to comply, the court could then act under Rule 70 of the Federal Rules of Civil Procedure and cause the transfer to be made by a court officer. Furthermore, for purposes of lien foreclosure, the situs of the debt may be irrelevant if the court has personal jurisdiction over both the principal defendant and his debtor. See, *e.g.*, *Schlaefer* v. *Schlaefer*, 112 F. 2d 177 (C.A.D.C.)

[7] It is true that Section 302(a) did not become effective until September 1, 1963. However, the United States was entitled to argue (see *Helvering* v. *Gowran*, 302 U.S. 238, 245) and did argue, this ground in support of the district court's decision. Section 302(a), modeled upon the Illinois counterpart, is held to apply to transactions occurring before its effective date. *Steele* v. *DeLeeuw*, 40 Misc. 2d 807, 244 N.Y.S. 2d 97 (S.C. Nassau Co.). See also *Nelson* v. *Miller*, 11 Ill. 2d 378, 143 N.E. 2d 673.

[8] There is a conflict of authority as to whether a defendant in Omar's position may enter a special appearance and defend

why such relief was inappropriate pending an effort to secure and perfect personal jurisdiction.

The United States, we submit, is entitled to a preliminary injunction during its efforts to secure personal jurisdiction over the taxpayer. Such an injunction is patently "necessary or appropriate for the enforcement of the internal revenue laws" within the meaning of Section 7402(a) of the Internal Revenue Code of 1954. In comparable situations the power of a district court to act has always been recognized. Thus, an injunction may be issued to preserve the *status quo* pending litigation of the issue of jurisdiction, *United States* v. *United Mine Workers,* 330 U.S. 258, 290. A district court may transfer an action to another district before the defendant in the action has been served with process. *Goldlawr, Inc.* v. *Heiman,* 369 U.S. 463. The provisional remedies provided by Rule 64 of the Federal Rules of Civil Procedure, including attachment and garnishment, become available upon the commencement of the action by the filing of the complaint even though the defendant has not been served with process.[9] A court of equity may entertain an independent action to prevent the dissipation of property pending the institution of an action at law to try title to the property. *Horsburg* v. *Baker,* 1 Pet. 232,

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on the merits as to the property over which the court has jurisdiction without submitting itself to the personal jurisdiction of the court. See generally 2 Moore, *Federal Practice*, Par. 12.13. It should be noted that Omar is now litigating the validity of the asssesment in the Tax Court.

[9] *Jacobson* v. *Coon*, 165 F. 2d 565 (C.A. 6th); *Marine Transport Lines, Inc.* v. *Nunes*, 211 F. Supp. 156 (N.D. Cal.)

236; *Georgia* v. *Brailsford*, 2 Dall. 402, 415.[10] The order sought in this case, we believe, is of the same nature.

Nor is such an order unfair to respondent in any respect. It would merely prevent respondent, which is concededly present within the jurisdiction of the court, from facilitating the dissipation of the taxpayer's assets in foreign countries. And the district court's retained power to amend the terms of the order and its expressed readiness to modify its provisions if it is demonstrated that they compel respondent to violate foreign law (p. 6, *supra*) afford respondent full protection.

3. We submit that the district court's power under Section 7402(a) of the Internal Revenue Code to enter a protective injunction while the government seeks to obtain personal service on Omar is sufficient ground to sustain the district court's order at this time without considering the issue treated by the court of appeals—*i.e.*, whether Omar's deposits in respondent's foreign branches, which are collectible in the first instance only abroad, may be the subject of a tax lien foreclosure action in New York. This latter question would become material to the issuance of the preliminary injunction only if personal jurisdiction over Omar could not be obtained. Nonetheless, if

(dictum); *Hearst* v. *Hearst*, 15 F.R.D. 258 (N.D. Cal.); *Reiber* v. *Trailmobile Co.*, 11 F.R.D. 431 (S.D. Mo.). But see *Interstate Cigar Co.* v. *Corral Wodiska y CA*, 30 F.R.D. 354 (E.D. N.Y.)

[10] See also *LaChapelle* v. *Bubb*, 69 Fed. 481 (E.D. Wash.); *Thomas* v. *Nantahala Marble & Talc Co.*, 58 Fed. 485 (C.A.

the question were ripe, we would urge that the court of appeals erroneously held that the United States could not enforce a tax lien against such a deposit.

Section 6321 of the Internal Revenue Code of 1954 imposes a tax lien upon "all property and rights to property" of a delinquent taxpayer. Section 7403(a) provides that an action may be brought to foreclose this lien "or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of" the tax. It is established that the government's tax lien, at the least, extends to all property of the taxpayer which is located within the United States. An action to foreclose a federal tax lien may be brought wherever the property is located. 28 U.S.C., Section 1655.[11] And the situs of a debt, under this Court's decision in *Harris* v. *Balk*, 198 U.S. 215, is wherever the debtor can be found. "Power over the person of the garnishee confers jurisdiction * * * [over the debt]." Id. at 222.[12]

4th); *Santee River Cypress Lumber Co.* v. *James*, 50 Fed. 360 (C.C. S.C.); *Lanier* v. *Alison*, 31 Fed. 100 (C.C. S.D. Ga.); *United States* v. *Parrott*, Fed. Cas. No. 15,988, 27 Fed. Cas. 416, 422–423 (CC. N.D. Cal.) (dictum).

[11] Section 1655 "provides an exemption from the general venue statute * * *." Hart and Wechsler, *The Federal Courts and the Federal System*, pp. 954–955; *Greeley* v. *Lowe*, 155 U.S. 58.

[12] It is true that in *Harris* v. *Balk*, *supra*, this Court did state that garnishment is only available if the garnishee's creditor could sue to collect the debt within the jurisdiction. However, this limitation is not relevant to the situs of the debt, but rather to the common-law rule that the garnishor

However, the court of appeals appears to have held that the United States' tax lien extends only to debts which the taxpayer could, at the time the lien attaches, collect by suit within the district. Since, under New York law (*Sokoloff* v. *National City Bank*, 239 N.Y. 158, 145 N.E. 917), Omar could sue in New York to collect deposits which are payable abroad only after demanding, and being refused, payment without the country, the court concluded that the United States did not have a tax lien upon those deposits which

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acquires no greater rights than the garnishee's creditor had. See id. at 226. Furthermore, it has not generally been interpreted to bar garnishment of a debt which is payable by contract at a place without the jurisdiction. Cases applying this rule are *Schlaefer* v. *Schlaefer*, 112 F. 2d 177, 182–183 (C.A.D.C., 1940) (dictum); *The Copperfield*, 7 F. 2d 499 (S.D. Ala., 1925), affirmed, 26 F. 2d 175 (C.A. 5th), certiorari denied, 278 U.S. 623; *Konstantinidis* v. *S.S. Tarsus*, 196 F. Supp. 433 (E.D.N.Y., 1961) (semble); *Pierce* v. *Pierce*, 153 Ore. 248, 56 P. 2d 336 (1936); *Morrison* v. *Illinois Central R. Co.*, 101 Neb. 49, 161 N.W. 1032 (1917); *Leech* v. *Brown*, 172 Iowa 182, 154 N.W. 440 (1915); *Shuttleworth & Co.* v. *Marx & Co.*, 159 Ala. 418, 49 So. 83 (1909); *Steer* v. *Dow*, 75 N.H. 95, 71 A. 217 (1908); *Harvey* v. *Thompson*, 128 Ga. 147, 57 S.E. 104 (1907); *Baltimore & O. R. Co.* v. *Allen*, 58 W. Va. 388, 52 S.E. 465 (1905); see also *Nichols* v. *Hooper*, 61 Vt. 295, 17 A. 134 (1889); *Tootle* v. *Coleman*, 107 Fed. 41 (C.A. 8th, 1901), certiorari denied 183 U.S. 695; *Cross* v. *Brown*, 19 R.I. 220, 33 A. 147 (1895) affirmed *sub nom. King* v. *Cross*, 175 U.S. 396; *Fisher* v. *Consequa*, Fed. Cas. No. 4816, 9 Fed. Cas. 120 (C.C. Pa. 1809) (semble); *Sturtevant* v. *Robinson*, 35 Mass. 175 (1836).

could be foreclosed in this action.[13] But as this Court held in *United States* v. *Bess*, 357 U.S. 51, the government's tax lien extends to all interests in property which, under State law, the taxpayer could himself secure. *Bess* does not intimate that the taxpayer must be able to reach this interest by suit rather than by some other method. And the lower federal courts, albeit with some exceptions, hold that the government's tax lien extends directly to property interests of the taxpayer which the taxpayer himself could

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[13] The court of appeals also seems to have placed some reliance upon the holding of some New York cases that the home office of the bank and its branches are separate entities. It is obvious, however, that the respondent is a single entity, composed of both a home office and branches, which is indebted to the taxpayer. See 12 U.S.C. 601 and 604. Furthermore, the capacity of the respondent to sue and be sued is governed by federal law (Federal Rules of Civil Procedure, Rule 17(b)), and the statute under which the respondent is organized confers the power "To sue and be sued" upon the corporation as a whole, not separately upon the home office and the branches. 12 U.S.C. 24. Consequently the district court has jurisdiction over the entire corporation. See *National Bank* v. *Republic of China*, 348 U.S. 356 (allowing set-off for securities located at foreign branch against debt owing at the home office); *First National City Bank* v. *Internal Revenue Service*, 271 F. 2d 616 (C.A. 2d), certiorari denied, 361 U.S. 948; see also *Domenech* v. *National City Bank*, 294 U.S. 199, 204; *United States* v. *Hopkins*, 193 F. Supp. 207, 210 (S.D.N.Y.).

The court of appeals in the present case recognized that respondent's home office and branches were part of a single entity in holding that the United States in this action may reach foreign branch deposits which are payable in New York.

secure by suit only by first making a demand upon his debtor or by surrendering an instrument.[14]

The sharp difference in approach is illustrated by the decision of the Fourth Circuit in *United States* v.

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[14] Thus, the United States is entitled to foreclose a lien on bank deposits even though the taxpayer could not reach them without surrendering the passbook. See *United States* v. *Bowery Savings Bank*, 297 F. 2d 380 (C.A. 2d); *United States* v. *Manufacturers Trust Co.*, 198 F. 2d 366 (C.A. 2d); *United States* v. *Emigrant Industrial Sav. Bank*, 122 F. Supp. 547 (S.D. N.Y.) (dictum). See also *United States* v. *Buia*, 144 F. Supp. 477 (S.D. N.Y.).

It can foreclose a lien upon the cash surrender value of life insurance policies even though the taxpayer could not reach that interest without formally electing to do so and surrendering the policy. *United States* v. *Ball* (C.A. 4th), decided January 7, 1964 (64-1 U.S.T.C., par. 9191); *United States* v. *Metropolitan Life Insurance Co.*, 256 F. 2d 17 (C.A. 4th); *United States* v. *Salerno*, 222 F. Supp. 664 (Nev.) (semble); *United States* v. *Brody*, 213 F. Supp 905 (Mass.), now pending on appeal (C.A. 1st); *United States* v. *Bankers' National Life Insurance Co.*, 198 F. Supp. 727 (N.J.), now pending on appeal (C.A. 3d); *United States* v. *Wilson*, 195 F. Supp. 332 (N.J.) (semble), affirmed on another ground, 304 F. 2d 530 (C.A. 3d); *United States* v. *Hopkins*, 193 F. Supp. 207 (S.D. N.Y.); *United States* v. *Bosk*, 180 F. Supp. 869 (S.D. Fla.) (semble). But see *United States* v. *Metropolitan Life Insurance Co.*, 130 F. 2d 149 (C.A. 2d); *United States* v. *Mitchell*, 210 F. Supp. 810 (S.D. Ala.), now pending on appeal (C.A. 5th) (semble). See also *United States* v. *Penn Mutual Life Insurance Co.*, 130 F. 2d 495 (C.A. 3d); *United States* v. *Massachusetts Mutual Life Insurance Co.*, 127 F. 2d 880 (C.A. 1st) (both denying levy penalty but possibly implying that lien foreclosure is available).

It can foreclose a lien upon a debt represented by a negotiable instrument, even though the taxpayer could not collect without surrendering the instrument. See *United States* v. *Schuermann*, 106 F. Supp. 86 (E.D. Mo.); see also *United States* v. *Caldwell*, 74 F. Supp. 114 (M.D. Tenn.).

Metropolitan Life Insurance Co., 256 F. 2d 17. In *Metropolitan Life*, the United States sought to reach the cash surrender value of life insurance policies of a taxpayer-insured who had fled the United States. It was held that the United States had a tax lien upon the cash surrender value of the policies which it was entitled to foreclose by suit in the district in which the insurance company was doing business even though the taxpayer-insured could not collect from the company without first electing to receive the cash surrender value and surrendering the policies. The court reasoned (pp. 24–25):

> * * * the surrender is for the protection of the companies and they will be as well protected by the judgment of the court as by the surrender of the policies, since the policies are not negotiable. * * * Harris v. Balk, supra. Of course, surrender of the policies should be ordered if the policies are available for surrender. When, however, they are unavailable for surrender, because the owner has absconded to a foreign country and is beyond the reach of personal process, and when the interest of the insurer will be protected by the judgment of the court, the insurer should be required to pay the cash surrender value in the proceeding under the statute. * * * we "see no reason to uphold a taxpayer who admits he has an interest in property but flauntingly says it is beyond the reach of the Government." To which we may add that the court is not so impotent that it cannot apply to the satisfaction of tax liens property interests of a taxpayer held by corporations within its jurisdiction.

The anomaly of the decision below is apparent when it is considered that Omar's deposits in respondent's foreign branches, even if not contractually collectible in New York, are as a practical matter probably collectible at any branch designated by Omar for payment. It is therefore unrealistic to consider the right of the respondent bank to insist upon payment abroad as being of any practical significance. The policy of the cases such as *Metropolitan Life* requires that these funds not be placed beyond the reach of a tax lien.

Although respondent has argued that it would not be protected by a *quasi in rem* judgment in this case because Omar might bring suit in a foreign court and collect its deposits, this possibility appears remote.[15] Assuming that the foreign tribunal might refuse comity to a United States judgment, respondent might be held entitled to reimbursement from the United States. Cf. *Cities Service Co.* v. *McGrath*, 342 U.S. 330. In any event, at this stage of the litigation the existence of actual or potential liability has not been established.

Nor do considerations of policy require exemption of deposits in foreign branches of United States banks from judgments *quasi in rem* foreclosing federal tax liens upon deposits transferred from the United

[15] "[J]udgments, not strictly *in rem*, under which a person has been compelled to pay money, are so far conclusive that the justice of payment cannot be impeached in another country, so as to compel him to pay again. * * * a judgment in foreign attachment is conclusive, as between the parties, of the right to the property or money attached." *Hilton* v. *Guyot*, 159 U.S. 113, 168. A judgment *in rem* is entitled to comity even if it is based upon a revenue claim. *Banco Nacional de Cuba* v. *Sabbatino*, No. 16, this Term, slip. op., pp. 14–15.

States and made payable at the branch. The Treasury Department plans to limit the institution of these enforcement suits to those cases in which the Internal Revenue Service has reason to believe that a taxpayer beyond the jurisdiction of the United States courts has been transferring funds out of the country to a foreign office in order to hinder or delay tax collection.[16] The maintenance of such actions cannot fairly be described as impairing the attractiveness of foreign branches of United States banks to their normal customers.[17]

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

LOUIS F. OBERDORFER,
Assistant Attorney General.

HAROLD C. WILKENFELD,
Attorney.

APRIL 1964

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[16] The Treasury Department also proposes to limit the authority to levy to such a situation.

[17] As indicated at the outset of point 3, we do not believe that the second issue need be reached in the present posture of the litigation, although it was in fact decided by the court of appeals.

A somewhat factually similar case is now pending on appeal in the Fifth Circuit, No. 19,990, *Johansson* v. *United States*. However, in that case, though the funds were payable at a foreign bank, the taxpayer has been served with process.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 307—September Term, 1962

(Argued April 11, 1963 Decided June 26, 1963)

Docket No. 27980

UNITED STATES OF AMERICA, APPELLEE

v.

FIRST NATIONAL CITY BANK, APPELLANT

and

OMAR, S.A., a Uruguayan corporation; LAZARD FRERES & CO.; LEHMAN BROTHERS; BELGIAN-AMERICAN BANKING CORP.; BELGIAN-AMERICAN BANK AND TRUST CO.; and FIRST NATIONAL CITY TRUST CO., DEFENDANTS

Before: MOORE, FRIENDLY and HAYS, *Circuit Judges.*

Appeal from an injunction issued by the United States District Court for the Southern District of New York, Archie O. Dawson, Judge, enjoining the transfer of funds held by the defendant's branch bank abroad for the account of an alleged delinquent taxpayer.

Vacated in part and remanded.

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MOORE, *Circuit Judge:*

This appeal presents an important question concerning the scope of an injunction against an American bank affecting deposits that may be held for the credit of an alleged delinquent taxpayer in a branch bank outside of the United States.

The taxpayer involved is Omar, S.A., a Uruguayan corporation. An investigation into Omar's affairs in this country revealed the likelihood that Omar was indebted to the United States for unpaid taxes and that sometime in June, 1961, Omar commenced a program of liquidating its holdings of securities in this country and transferring the receipts to Uruguay.[1] On October 31, 1962, the Internal Revenue Commissioner caused the issuance of jeopardy assessments against the taxpayer for deficiencies in corporate income tax totalling about $19,300,000 for the fiscal years March 31, 1955, through 1961, inclusive. Notice of the assessment and demand for payment was sent to Omar.

On the same day the United States filed a complaint in the District Court for the Southern District of New York naming as defendants Omar, S.A.; two banks, The First National City Bank of New York

[1] An affidavit submitted by John H. Walker, an employee of the Office of International Operations, Internal Revenue Service, states that an investigation of the records of Lazard Freres & Co. revealed that on June 23, 1961, Omar was paid $400,000 with the notation, "Pd Belgian American Banking Corp. a/c Baco Italo Belge Montevideo for your account" and on December 8, 1961, $1,640,000 was paid to Omar with the notation, "Transfer by wire to 1st National City Bank of ny (sic) Montevideo credit for your account." An affidavit submitted by Forrest J. Kern of the same office reveals a withdrawal from Omar's account with Lehman Brothers of $500,000 with the notation "check to 1st National City Bank."

and Belgian-American Banking Corp.; two brokerage houses, Lazard Freres & Co. and Lehman Bros.; and two trust companies, First National City Trust Co. and Belgian-American Bank & Trust Co. The complaint alleged that defendants, other than Omar, held sums for the account of or to the credit of Omar and prayed that the District Court adjudge Omar indebted to the government for unpaid taxes; find a valid lien existing in favor of the plaintiff on all property or rights to property belonging to the defendant Omar; enjoin the other defendants from in any way transferring or disposing of such property; order the return of all such property to the jurisdiction of the court; and order the foreclosure of plaintiff's lien on any such property held by defendants and its judicial sale. No personal jurisdiction has been obtained over the taxpayer Omar. An application for a temporary restraining order was granted on October 31, 1962, and on November 20, 1962, the district court, after hearing both sides, granted a preliminary injunction enjoining certain defendants from transferring or disposing of any property or rights to property, whether or not located within the United States, held for the account of Omar by defendants, their branches, agents or nominees.[2]

Defendant First National City Bank of New York [hereinafter referred to as "Citibank"] appeals from so much of the order as applies to property or rights to property that it may hold in branch banks outside

[2] The defendants Belgian-American Banking Corp. and First National City Trust Co. filed uncontroverted affidavits alleging that they held no property or rights to property belonging to the taxpayer. Therefore, they were excluded from the order issued by the court.

the United States.[3] Citibank's argument on appeal is that under New York law, a deposit in its branch bank would not be collectible by Omar in New York, Omar's sole right being against any branch bank in which such deposits have been made; that there being no debt in the United States, there is no property or right to property to which a federal lien can attach; and that the district court was without jurisdiction to issue an injunction affecting any such deposits. The Government in turn asserts that Citibank is itself the debtor and that a lien attached to this debt in New York; that the federal lien attached even if the situs of the debt be outside the United States; and that in any event, personal jurisdiction over Citibank was sufficient basis for the issuance of the injunction.

I

To put these contentions in their proper perspective, a short summary of the enforcement provisions of the Internal Revenue Code of 1954 and judicial decisions thereunder is appropriate. The Code provides several alternative methods for the collection of the

[3] Jurisdiction over this appeal from the granting of a preliminary injunction lies under 28 U.S.C. § 1292(1). In reviewing the preliminary injunction, this court may inquire into the jurisdiction of the district court as well as into the adequacy of the complaint for the injunction cannot stand if the complaint itself cannot stand. *Deckert* v. *Independence Shares Corp.*, 311 U.S. 282 (1940); *John Hancock Mutual Life Ins. Co.* v. *Kraft*, 200 F. 2d 952 (2d Cir. 1953); *Pang-Tsu Mow* v. *Republic of China*, 201 F. 2d 195 (D.C. Cir. 1952), cert. denied, 345 U.S. 925 (1953); *Eighth Regional War Labor Board* v. *Humble Oil & Refining Co.*, 145 F. 2d 462 (5th Cir. 1944), cert. denied, 325 U.S. 883 (1945).

revenue from those who neglect or refuse to pay.[4] Sections 6321 and 6322, 26 U.S.C., provide that a lien upon "all property and rights to property" belonging

[4] The relevant sections provide:

§ 6321. *Lien for taxes.*

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

§ 6322. *Period of Lien.*

Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time.

§ 6331. *Levy and Distraint.*

(a) Authority of Secretary or Delegate.—If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. * * * If the Secretary or his delegate makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary or his delegate and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

§ 6332. *Surrender of Property Subject to Levy.*

(a) Requirement.—Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary or his delegate, surrender such property or rights

to a taxpayer who has refused or neglected to pay any tax arises at the time an assessment is made. In addition, the Service is authorized to collect such tax

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(or discharge such obligation) to the Secretary or his delegate, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

(b) Penalty for Violation.—Any person who fails or refuses to surrender as required by subsection (a) any property or rights to property, subject to levy, upon demand by the Secretary or his delegate, shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of the taxes for the collection of which such levy has been made, together with costs and interest on such sum at the rate of 6 percent per annum from the date of such levy.

§ 7402. *Jurisdiction of District Courts.*

(a) To Issue Orders, Processes, and Judgments.—The district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction, and of ne exeat republica, orders appointing receivers, and such other orders and processes, and to render such judgment and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws.

§ 7403. *Action to Enforce Lien or to Subject Property to Payment of Tax.*

(a) Filing.—In any case where there has been a refusal or neglect to pay any tax, or to discharge any liability in respect thereof, whether or not levy has been made, the Attorney General or his delegate, at the request of the Secretary or his delegate, may direct a civil action to be filed in a district court of the United States to enforce the lien of the United States under this title with respect to such tax or liability or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title or interest, to the payment of such tax or liability.

by levy on all property or rights to property either belonging to the taxpayer or on which there is a lien. 26 U.S.C. § 6331(a). Any person in possession of property or rights to property on which a levy has been made who fails to surrender such property to the Service on demand is personally liable in a sum equal to the value of the property or rights not surrendered. 26 U.S.C. § 6332(b).

The statutory scheme also provides for resort to the courts if necessary. Section 7403(a) permits the filing of a civil action in the district court to enforce a federal tax lien, whether or not levy has also been made. In addition, the district courts have jurisdiction to issue all orders or injunctions necessary or appropriate for the enforcement of the internal revenue laws. 26 U.S.C. § 7402(a).

The effect of the foregoing provisions is to create a statutory attachment or garnishment without requiring resort to the court processes normally necessary in ordinary garnishment proceedings. *United States* v. *Eiland*, 223 F. 2d 118 (4th Cir. 1955). Where for some reason personal jurisdiction over the delinquent taxpayer is unobtainable, the Service is able to proceed in actions quasi in rem to enforce its lien on specific property belonging to the taxpayer within the jurisdiction of the court. See *United States* v. *Balanovski*, 236 F. 2d 296 (2d Cir. 1956), cert. denied, 352 U.S. 968 (1957).

The crucial question here is whether appellant holds property or rights to property of the taxpayer Omar subject to the jurisdiction of the district court.[5] The

[5] For the sake of brevity, future references in this opinion to "property belonging to the taxpayer" are to be taken to include "rights to property" as well.

nature of Omar's right against Citibank arising out of a deposit made in Citibank's Montevideo branch bank is to be determined by state law for the tax lien statute "creates no property rights but merely attaches consequences, federally defined, to rights created under state law." *United States* v. *Bess*, 357 U.S. 51, 55 (1958); see *Aquilino* v. *United States*, 363 U.S. 509 (1960); *Raffaele* v. *Granger*, 196 F. 2d 620 (3d Cir. 1952).

The proper place to sue to enforce a lien is in the district in which the property is located. *United States* v. *Dallas National Bank*, 152 F.2d 582 (5th Cir. 1945). Absent jurisdiction over the person of Omar, this action can proceed only on the ground that Citibank's debt to Omar is within the jurisdiction of the district court. *Hanson* v. *Denckla*, 357 U.S. 235 (1950), made explicit what had been assumed since *Pennoyer* v. *Neff*, 95 U.S. 714, 733 (1877), namely, that a state has no right "to enter a judgment purporting to extinguish the interest of such a person [over whom it has no personal jurisdiction] in property over which the court has no jurisdiction." 357 U.S. at 250.

The Government argues that the situs of the debt is irrevelant because a bank account creates a debtor-creditor relationship which is subject to levy, *United States* v. *Bowery Savings Bank*, 297 F. 2d 380 (2d Cir. 1961); *United States* v. *Manufacturers Trust Co.*, 198 F. 2d 366 (2d Cir. 1952); *United States* v. *Third National Bank & Trust Co.*, 111 F. Supp. 152 (M.D. Pa. 1953), and that, therefore, jurisdiction exists in the district court because the "obligation of the debtor to pay clings to and accompanies him wherever he goes." *Harris* v. *Balk*, 198 U.S. 215, 222 (1905). Although the Government correctly characterizes the relationship between bank and depositor, its argument

merely begs the determinative question, namely, who is the actual debtor in this case, the appellant or its branch banks. The nature of garnishment proceedings is such that the garnishor obtains no greater right against the garnishee than the garnishee's creditor had. *Harris* v. *Balk, supra,* at 222; *Karno-Smith Co.* v. *Maloney,* 112 F. 2d 690, 692 (3d Cir. 1940); *Wheeler* v. *Thomas,* 31 F. Supp. 702 (D.C.D.C. 1940). But *cf. United States* v. *Manufacturers Trust Co., supra.* Thus, only if Omar could sue appellant in New York to recover his deposit, can the Government, as Omar's creditor, sue in New York. Inquiry, therefore, must be made into the nature of the debt owed to Omar under state law.

A review of the New York cases indicates a consistent line of authority holding that accounts in a foreign branch bank are not subject to attachment or execution by the process of a New York court served in New York on a main office, branch or agency of the bank. See Comment, Garnishment of Branch Banks, 56 Mich. L. Rev., 90 (1957). This doctrine finds its inception in English law. An important case is *Richardson* v. *Richardson & National Bank of India, Ltd.,* [1927] Probate 228, 137 L.T. R492, 163 L.T. 450, involving an attempt by a wife to obtain a garnishee order against the account of her husband in a bank whose head office was in London. The question presented was whether the garnishee order could extend to deposits to the husband's credit in branch banks in Kenya and Tanganyika. The Court, after reviewing prior English authorities such as *Woodland* v. *Fear,* 7 E. & B. 519 (1857) and *Rex* v. *Lovitt,* [1912] A.C. 212 (P.C.), found that the contractual obligation between bank and customer contains certain implied terms, these being that (1) the promise of the bank is to repay at the branch

where the account is kept; and (2) the bank is not required to pay until payment is demanded at the branch where the account is kept. Therefore, since the debt of the bank at its main office did not extend to deposits in its branch banks, it was not property within the jurisdiction of the English court and was not subject to attachment there.

An early case in New York, *Chrzanowska* v. *Corn Exchange Bank,* 173 App. Div. 285, 159 N.Y.S. 385 (1st Dep't 1916), affirmed, 225 N.Y. 728, 122 N.E. 877 (1919), dealing with the relationship between branch banks, established the proposition that domestic branches within the same city were to be regarded as distinct and separate entities and that deposits made in branch banks are payable there and only there. The court said: "the different branches were as separate and distinct from one another as from any other bank." 173 App. Div. at 291, 159 N.Y.S. at 388. But see *Konstantinidis* v. *The S.S. Tarsus,* 196 F. Supp. 433 (E.D.N.Y. 1961). This view was thereafter applied to foreign branches with respect to the collection of forwarded paper, the court stating that "the branch is not a mere 'teller's window'; it is a separate business entity." *Pan-American Bank & Trust Co.* v. *National City Bank,* 6 F. 2d 762, 767 (2d Cir.), cert. denied, 269 U.S. 554 (1925). Furthermore, the contract between the bank and a depositor in a foreign branch is to pay in the currency of the branch in which the deposit is made. *Sokoloff* v. *National City Bank,* 250 N.Y. 69, 164 N.E. 745 (1928); *Zimmerman* v. *Hicks,* 7 F. 2d 443 (2d Cir. 1925), affirmed sub nom. *Zimmermann* v. *Sutherland,* 274 U.S. 253 (1926). The separate entity theory is subject only to the exception that if the branch be closed or if demand for payment is refused at the branch, an action against the main office will

lie. *Sokoloff* v. *National City Bank*, 239 N.Y. 158 145 N.E. 917 (1924); *Richardson* v. *Richardson & National Bank of India, Ltd., supra.*[6]

Bluebird Undergarment Corp. v. *Gomez*, 139 Misc. 742, 249 N.Y.S. 319 (City Ct., N.Y. Cty. 1931), dealt with the scope of a warrant of attachment served on the main office of a bank located in New York involving an account of a defendant outside the United States. The issue arose on a motion to compel the bank to produce information showing whether the defendant had any sums on account in the bank's Puerto Rico branch. Relying on the separate entity theory espoused in *Richardson* and *Chrzanowska*, the court found that the defendant could not have commenced an action in New York to recover his deposit in Puerto Rico. The court in its opinion said:

> "Not only are branch banks separate entities, but deposits made in a branch bank are payable there and there only * * *. A branch bank being separately indebted to its depositor, the existing obligation lies primarily between such branch bank and its depositor. The conclusion follows as a necessary corollary that the debt owed by a branch finds its situs within the territorial jurisdiction of such branch."

139 Misc. at 744, 249 N.Y.S. at 321–22. See also *Philipp* v. *Chase National Bank*, 34 N.Y.S. 2d 465 (Sup. Ct., N.Y. Cty. 1942); *Walsh* v. *Bustos*, 46 N.Y.S. 2d 240 (City Ct., N.Y. Cty. 1943).

In *Clinton Trust Co.* v. *Compania Azucarera Central Mabay S.A.*, 172 Misc. 148, 14 N.Y.S. 2d 743 (Sup. Ct., N.Y. Cty., affirmed without opinion, 258 App. Div. 780 (1st Dep't 1939)), the court was faced

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[6] For a discussion of the legal problems arising out of the growth of branch banking, see Fordham, Branch Banks as Separate Entities, 31 Colum. L. Rev. 975 (1931).

with an application to direct Chase National Bank and the Royal Bank of Canada to answer certain questions concerning the status of deposit accounts of the defendant in their branch banks in Havana, Cuba. In denying the application, the court relied on the authorities already discussed, but found additional support for its conclusion with respect to Chase in 12 U.S.C. § 604. That section provides that:

> "Every national banking association operating foreign branches shall conduct the accounts of each foreign branch independently of the accounts of other foreign branches established by it and of its home office, and shall at the end of each fiscal period transfer to its general ledger the profit or loss accrued at each branch as a separate item."

See also *Pan-American Bank & Trust Co.* v. *National City Bank, supra.*

Later cases in New York, while still resting on the separate entity theory, have stressed the policy justifications underlying the rule. In *Cronan* v. *Schilling,* 100 N.Y.S. 2d 474, 476 (Sup. Ct., N.Y. Cty. 1950), the Court stated:

> "Unless each branch of a bank is treated as a separate entity for attachment purposes, no branch could safely pay a check drawn by its depositor without checking with all other branches and the main office to make sure that no warrant of attachment had been served upon any of them. Each time a warrant of attachment is served upon one branch, every other branch and the main office would have to be notified. This would place an intolerable burden upon banking and commerce, particularly where the branches are numerous, as is often the case."

Similarly in *Newtown Jackson Co.* v. *Animashaun,* 148 N.Y.S. 2d 66 (Sup. Ct., Nassau Cty. 1955), the court found that the rule rested on two grounds: (1) the

situs of the debt is at the branch where the account is carried; (2) the crippling effect a contrary rule would have on banking practice involving branch banks in distant corners of the globe.

Most recently, the rule has received the sanction of the New York Court of Appeals in *McCloskey* v. *Chase Manhattan Bank*, 11 N.Y. 2d 936 (1932), which was an action to recover (by attachment) in New York moneys payable at a branch of the New York bank in Germany. The funds were held not to be subject to New York attachment. The Court of Appeals, without opinion, affirmed the judgment granting defendant's motion to dismiss the complaint.

The Government seeks to vitiate the effect of these cases by contending that they relate merely to state-imposed restrictions upon the remedy of a creditor of a depositor, stressing the fact that none of these cases involved an actual attempt by a depositor to demand payment in New York of a deposit made in a branch bank abroad.[7] Relying on *United States* v.

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[7] *Varga* v. *Credit-Suisse*, 2 A.D. 2d 596, 157 N.Y.S. 2d 391 (1st Dep't 1956) is urged by the Government as authority for the proposition that a depositor may sue a New York branch of a foreign bank with respect to an account in another foreign branch of the bank. However, that case involved a suit for breach of contract arising out of the alleged wrongful transfer of funds deposited in a Hungarian branch. The sole question decided there was that § 200, sub. 3 of the New York Banking Law, did not prevent a suit against an agent of a foreign bank in New York where the cause of action arose outside of New York. In addition, although the question was not reached by the court, it is possible that the action might be governed by the rule of *Sokoloff* v. *National City Bank*, 239 N.Y. 158, 145 N.E. 917 (1924), which permitted an action against the main office where payment had been refused at a branch office. Here, since the funds had allegedly been transferred, no demand would even be necessary. *Cf. Sokoloff* v. *National City Bank*, 250 N.Y. 69, 80–81, 164 N.E. 745, 749 (1928).

Bess, supra, it argues that state-created restrictions on enforcement remedies are inoperative to prevent the attachment or enforcement of federal tax liens.[8]

This argument fails to recognize the full import of the New York cases. The reason that attachment fails is in no way due to any peculiar vagaries in the attachment remedy itself; rather, it is the result of the New York substantive rule that there is no obligation due at the main branch to a depositor in another branch and, therefore, no property subject to attachment within the jurisdiction of the New York courts.[9]

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[8] In *Bess*, after holding that the federal lien did not attach to the proceeds of an insurance policy on the life of the insured but only to the cash surrender value of the policy, the Court rejected the contention that no federal lien attached to the cash surrender value because under state law that property right was not subject to creditors' liens. Once it was determined under state law that a property right existed in the insured taxpayer, the state attachment law became irrelevant.

[9] Further support for this conclusion can be garnered from the refusal of the New York courts to extend § 916(3) of the New York Civil Practice Act to these cases. See *Cronan* v. *Schilling*, 100 N.Y.S. 2d 474 (Sup. Ct., N.Y. Cty. 1950); Casenote, Branch Banking as Separate Entity for Attachment Purposes, 48 Cornell L.Q. 333 (1963). That section provides for attachment upon: "a debt, arising under or on account of a contract * * * due * * * to a resident or non-resident person or corporation, from a resident or non-resident person or corporation, upon whom or which service of process may be had within the county, provided that an action could be maintained by the defendant within the state for the recovery of such debt at the maturity thereof or where the debt consists of a deposit of money not to be repaid at a fixed time but only upon special demand, that such demand therefor could be duly made by defendant within the state."

If the substantive law of the state were, as the Government urges, that a depositor in a foreign branch could demand payment at a New York branch, then § 916(3) by its terms would

Furthermore, the policy justifications offered to support the rule rest not on the inappropriateness of attachment as a remedy, but on the more fundamental notion that to require any branch to respond to the demand of a depositor in another branch anywhere in the world would impose an intolerable burden on the banking community. This would be the result of not only the impracticality of requiring constant transmission of reports on the status of accounts in one branch to all other branches, but on the complications that arise out of the fact that different branches may be subject to the laws of other countries and may be dealing in different currencies.[10]

The Government also places some reliance on the rejection of the separate entity theory, based on 12 U.S.C. § 604, in *First National City Bank* v. *Internal Revenue Service,* 271 F. 2d 616 (2d Cir. 1959). There this Court held that this section was not a bar to requiring the bank to produce bank records, physically located in its branch bank in Panama, relating to an account of a Panama corporation. There are two ready answers to this contention. In the first place, in only one New York case has there even been partial reliance on 12 U.S.C. § 604. See *Clinton Trust Co.* v. *Compania Azucarera Central Maby S.A., supra.* Secondly, *First National City* did not reject

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be applicable to the case of attachment by a creditor of the depositor. The section is, however, inapplicable only because the state rule is that a depositor could not successfully demand payment in New York.

[10] Problems arising out of the fact that different branches deal with different currencies include questions of the possible necessity of securing a license in order to convert the foreign currency into American dollars, the effective date for determination of the rate of exchange and the selection of the proper exchange rate when multiple exchange rates are in force.

the separate entity theory for all purposes and under all circumstances. Thus, this Court there recognized that a prior decision in this Circuit, *Pan-American Bank & Trust Co.* v. *National City Bank, supra,* which relied in part on § 604, had held that "in various commercial transactions between a branch bank and its home office the rights involved are to be determined as though the branch was acting at arm's length as an independent entity." *First National City Bank* v. *Internal Revenue Service, supra,* at 619. The court in no way intimated disapproval of the *Pan-American* opinion; it merely found that the case at bar, involving a question of whether the main office had sufficient control over its branch to order the return of certain records for examination, was distinguishable from the arm's length transaction in *Pan-American.*

The court below rested its decision to issue the injunction on the grounds that the court having personal jurisdiction over Citibank, it had the power to compel the performance of acts respecting property situated outside its jurisdiction. The district court relied on cases sustaining the power of the district court to require the production of records held in branch banks pursuant to a summons served upon its home office.[11] *First National City Bank* v. *Internal*

[11] A recurring problem in these cases is the effect that is to be given to the fact that compliance with the production order may subject the party or witness to civil liability or criminal penalties under the law of the country in which the records are located. Under these circumstances, the burden of proceeding by appropriate process in the courts of the foreign country shifts to the party seeking production, with some vague duty on the part of the person subpoenaed to cooperate in this endeavor. See Note, Subpoena of Documents Located in Foreign Jurisdiction Where Law of Situs Prohibits Removal, 37 N.Y.U.

Revenue Service, supra; Application of Chase Manhattan Bank, 297 F. 2d 611 (2d Cir. 1962). But *cf. Ings* v. *Ferguson,* 282 F. 2d 149 (2d Cir. 1960). Furthermore, in *United States* v. *Ross,* 302 F. 2d 831 (2d Cir. 1962) the power of a district court to order the taxpayer, over whom personal jurisdiction had been obtained, to transfer stock certificates, located in the Bahamas, to a receiver appointed by the district court, was upheld. See also *S.E.C.* v. *Minas de Artemisa, S.A.,* 150 F. 2d 215 (9th Cir. 1945).

Here, however, the absence of personal jurisdiction over the taxpayer Omar is a crucial factor in distinguishing the *Ross* case. Since Omar was not before the court, no personal judgment could have been rendered against it. Only a judgment *quasi in rem* extinguishing Omar's rights in any property it might have within the district court's jurisdiction would be valid. A prerequisite to such jurisdiction must be power over the *res. Hanson* v. *Denckla, supra.*

Although Citibank might be liable personally for wrongfully refusing to surrender property on which the Government holds a lien, 26 U.S.C. § 6332, any such action would have to be predicated on the existence of a valid lien. See 26 U.S.C. § 7403. Since the property is without the *United States,* no valid lien ever attached.

The Government, however, asserts that the words of the tax lien statute, 26 U.S.C. § 6321, have a global application and that the lien attaches to property of the taxpayer anywhere in the world. If taken literally, the statute might be susceptible to this interpre-

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L. Rev. 295 (1962). Similar assertions were made by the defendants in this case. The court below held that defendants had failed to offer any proof on the applicable foreign law, but if it were later shown that compliance would violate foreign law, the injunction could be modified accordingly.

tation, but to so construe it would do violence to the settled principle of statutory construction that legislation is meant to apply only within the territorial jurisdiction of the United States unless a contrary intention appears. *Blackmer* v. *United States,* 284 U.S. 421, 437 (1932); *Foley Bros., Inc.* v. *Filardo,* 336 U.S. 281, 285 (1949); *Lauritzen* v. *Larsen,* 345 U.S. 571, 577 (1953); *McCulloch* v. *Sociedad Nacional de Marineros de Honduras,* 372 U.S. 10, 21–22 (1963). The Supreme Court has made manifest its reluctance to read an extraterritorial force into statutes when to do so would extend coverage beyond places over which the United States has legislative control, *Foley Bros., Inc.* v. *Filardo, supra,* or would interfere with the rights of other nations, *Lauritzen* v. *Larsen, supra.*

It has long been a general rule that one sovereignty may not maintain an action in the courts of another state for the collection of a tax claim. *Government of India* v. *Taylor,* [1955] A.C. 516; *Moore* v. *Mitchell,* 28 F. 2d 997 (S.D.N.Y. 1928), aff'd, 30 F. 2d 600 (2d Cir. 1929), aff'd on other grounds, 281 U.S. 18 (1930); *State of Colorado* v. *Harbeck,* 232 N.Y. 71, 133 N.E. 357 (1921). *Contra, State ex rel. Oklahoma Tax Comm'n* v. *Rodgers,* 238 Mo. App. 1115, 193 S.W. 2d 919 (1946). The nations of the world have only recently begun to deal with the problem of extraterritorial collection of tax revenues through the medium of negotiated tax treaties providing for mutual cooperation.[11] See Note, International Enforcement of Tax Claims, 50 Colum. L. Rev. 490 (1950). Absent an explicit indication to the contrary, there should not be attributed to Congress an intent to give the courts of this nation, in this highly

[11] No such treaty exists with Uruguay. 4 CCH Fed. Tax Rep. ¶ 4281.

sensitive area of intergovernmental relations, the power to affect rights to property wherever located in the world. The apparent necessity of tax treaties underscores the conclusion that Congress has seen fit to handle this problem in another manner.

III

Although the result here is in large part dictated by a state rule having its genesis in policy considerations having little to do with the collection of the revenue, application of that rule to the facts here comports with sound reason and public policy. Unfortunate as it may be that Omar will be able to escape, at least partially, from a possible tax liability involving substantial sums, in the long run it is unlikely that a different rule here would provide much consolation to the Internal Revenue Service. The artful tax dodger would not have to be too sophisticated to realize that all he need do to escape liability is place his deposits in a bank of local origin that is beyond the power of our courts. This would lead only to harmful consequences for our banking system abroad without any concomitant benefits here at home.

In addition, the rule suggested by the Government would have to work both ways. As yet, our courts have been faced only with cases seeking to attach deposits in foreign branches of American banks by service on the home office here, *Bluebird Undergarment Corp.* v. *Gomez, supra; Clinton Trust Co.* v. *Compania Azucarera Central Mabay, S.A., supra; Phillips* v. *Chase National Bank, supra; McCloskey* v. *Chase Manhattan Bank, supra,* and others seeking to attach deposits in foreign banks by service on a branch of such a bank doing business in New York. *Clinton Trust Co.* v. *Compania Azucarera*

Central Mabay S.A., supra; Walsh v. *Bustos, supra; Cronan* v. *Schilling, supra; Newtown Jackson Co.* v. *Animashun, supra.* However, it is inconceivable that the issuance of an injunction by a court of a foreign country against an American branch bank affecting the accounts or activities of the head office in the United States would be looked upon with favor. The untoward difficulties and potential conflict between the laws of different nations that such a doctrine would produce militate against giving it support here.

The court concludes that the injunction issued by the district court was beyond its jurisdiction as to deposits held abroad that are collectible only outside the United States. The record, however, does not make clear whether any special arrangements may have existed between Citibank and Omar making the deposit payable, not in pesos at Montevideo, but in dollars in New York. The injunction should therefore be modified in such a way as to preserve any rights of the Government should it appear that Omar's accounts were in fact payable in New York.

Vacated in part and remanded for modification of the injunction in conformity with this opinion.

HAYS, Circuit Judge, dissenting:

In his learned opinion my brother Moore has almost completely lost sight of what it is that we are asked to review. The extensive dissertation on the nature and characteristics of attachable lienable property under New York law is an admirable display of my colleague's well known erudition and of his customary careful and exhaustive research. But it has little if anything to do with the case in hand.

The order appealed from was issued by the district court under the authority of § 7402(a) of the Internal Revenue Code of 1954 which provides:

> "The district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction, and of *ne exeat republica*, orders appointing receivers, and such other orders and processes, and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws."

The order of the district court does not purport to establish or enforce any lien on any property or to direct the payment of any sums whatever. It is a simple order, confined to a direction to the appellant (and certain others) to keep the property of the taxpayer which they now hold. The order reads:

> "ORDERED, that pending the determination of this action or until further order of this Court, the defendants, Lazard Freres & Co., Lehman Brothers, Belgian-American Banking Corp. and First National City Bank of New York, or any of them, be and they are hereby restrained from selling, transferring, pledging, encumbering, disposing of, or distributing any property or rights to property of Omar, S.A., including, but not limited to, any sums, credits, stock, or bonds or any interest, dividends, or other earnings thereon now held for or for the account of the said Omar, S.A., by them or by any of their branches, agents, or nominees whether

> located within the United States or not and whether their branches, agents, or nominees are located within the United States or not."

The record indicates that the district court was completely justified in issuing the injunction. In May 1962 counsel for taxpayer told government representatives that if the government should attempt to establish tax liability, taxpayer would liquidate its holdings in the United States. Later one of taxpayer's directors came to the United States and began a systematic liquidation of those holdings. By October 31, 1962, when the Commissioner assessed jeopardy assessments totalling $19,300,000, taxpayer had already transferred at least $2,300,000 out of the country.

The order is merely a preliminary injunction to prevent further dissipation of taxpayer's assets. The district court did not determine, nor was there any occasion for its determining, whether the government's lien attached to all the property immobilized by the order, or what part of such property the government would be able to get possession of in the later stages of this proceeding or in some other proceeding.

There is no doubt that the district court, having in personam jurisdiction over appellant, had the power to issue its order. Indeed appellant does not deny such power except with respect to property of the taxpayer held by appellant's foreign branches. The district court has the power to order the appellant over whom it has personal jurisdiction to act or to refrain from acting both within and without the territorial jurisdiction of the court. *United States* v. *Ross*, 302 F. 2d 831 (2d Cir. 1962). It is of no consequence, as the majority believes, that the court does not have jurisdiction over Omar. The court's jurisdiction is not in any sense jurisdiction over the res, it is jurisdiction over the person of the appellant.

The present issue as to property of the taxpayer which is held by appellant's foreign branches is not as the majority believes, whether that property can be recovered in the pending proceeding. The only issue is whether appellant has power to carry out the order of the court with respect to that property. It is clear that appellant has that power (*First National City Bank* v. *Internal Revenue Service,* 271 F. 2d 616 (2d Cir. 1959), *cert. denied* 361 U.S. 948 (1960)), and indeed appellant does not deny that it could prevent its foreign branches from releasing property to the taxpayer.

Appellant cannot at this stage be permitted to argue that, although it does not deny that it could effectively prevent its foreign branches from paying out money to the taxpayer, it cannot be required to do so because the government may not be able to recover that money in the present suit. Neither the district court nor this court can or should decide on the present record that the government has no recourse by which it could ever recover the property which the government seeks to protect from dissipation. Even if it should be granted that in the present proceeding the government could not recover property of the taxpayer held by a foreign branch, is this court now prepared to hold, for example, that there is no possibility that a receiver appointed under the authority of § 7402(a) would be able to proceed against taxpayer's property under any circumstances or anywhere other than New York? The majority's reference to the absence of a tax treaty with Uruguay is irrelevant since not only is the absence of such a treaty not dispositive, but there is nothing in the record before us to show that foreign branches of appellant other than that in Montevideo do not hold property of the taxpayer.

The result of the present decision is a wholly unwarranted limitation on the government's power to preserve property of delinquent taxpayers from dissipation pending proceedings to recover that property. With respect I must dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 196—September Term, 1963.

(Argued October 18, 1963 Decided January 13, 1964)

Docket No. 27980

UNITED STATES OF AMERICA, APPELLEE,

v.

FIRST NATIONAL CITY BANK, APPELLANT,

and

OMAR, S.A., a Uruguayan corporation; LAZARD FRERES & Co.; LEHMAN BROTHERS; BELGIAN-AMERICAN BANKING CORP.; BELGIAN-AMERICAN BANK AND TRUST CO.; and FIRST NATIONAL CITY TRUST CO., DEFENDANTS.

Before: LUMBARD, *Chief Judge,* CLARK, WATERMAN, MOORE, FRIENDLY, SMITH, HAYS and MARSHALL, *Circuit Judges.*

PER CURIAM:

The court having sat *in banc* to hear the appeal, with the exception of Judge Kaufman who did not participate, and due deliberation having been had thereon, Judges Lumbard, Waterman, Moore, and Friendly vote to reverse the order of the district

court for the reasons set forth in Judge Moore's opinion reported at 321 F. 2d 14, and Judges Smith, Hays, and Marshall vote to affirm for the reasons set forth in Judge Hays' opinion reported at 321 F. 2d 25.[1] The order of the district court, reported at 210 F. Supp. 773 (1962), is accordingly reversed.

Upon application therefor, the court will grant a stay, pursuant to Rule 28(c), pending application for certiorari to the Supreme Court of the United States.

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[1] Prior to his death Judge Clark had indicated his intention to vote for affirmance.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirteenth day of January one thousand nine hundred and sixty-four.

Present:

Hon. J. EDWARD LUMBARD, *Chief Judge*,
Hon. STERRY R. WATERMAN,
Hon. LEONARD P. MOORE,
Hon. HENRY J. FRIENDLY,
Hon. J. JOSEPH SMITH,
Hon. PAUL R. HAYS,
Hon. THURGOOD MARSHALL,
Circuit Judges.

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

OMAR, S.A., LAZARD FRERES & CO., ET AL., DEFENDANTS,

FIRST NATIONAL CITY BANK OF NEW YORK, (FIRST NATIONAL CITY BANK), DEFENDANT-APPELLANT.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed.

Further ordered that the judgment of this Court of June 26, 1963, be and it hereby is vacated.

A. DANIEL FUSARO, *Clerk*.

APPENDIX D

Internal Revenue Code of 1954:

SEC. 6321. LIEN FOR TAXES.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

(26 U.S.C., 1958 ed., Sec. 6321.)

SEC. 7402. JURISDICTION OF DISTRICT COURTS.

(a) *To Issue Orders, Processes, and Judgments.*—The district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction, and of *ne exeat republica*, orders appointing receivers, and such other orders and processes, and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws.

* * * * * *

(26 U.S.C., 1958 ed., Sec. 7402.)

SEC. 7403. ACTION TO ENFORCE OR TO SUBJECT PROPERTY TO PAYMENT OF TAX

(a) *Filing.*—In any case where there has been a refusal or neglect to pay any tax, or to discharge any liability in respect thereof, whether or not levy has been made, the Attor-

ney General or his delegate, at the request of the Secretary or his delegate, may direct a civil action to be filed in a district court of the United States to enforce the lien of the United States under this title with respect to such tax or liability or to subject any property, or whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability.

* * * * *

(26 U.S.C., 1958 ed., Sec. 7403.)

SEC. 1655. LIEN ENFORCEMENT; ABSENT DEFENDANTS

In an action in a district court to enforce any lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to, real or personal property within the district, where any defendant cannot be served within the State, or does not voluntarily appear, the court may order the absent defendant to appear or plead by a day certain.

Such order shall be served on the absent defendant personally if practicable, whenever found, and also upon the person or persons in possession or charge of such property if any. Where personal service is not practicable, the order shall be published as the court may direct, not less than once a week for six consecutive weeks.

If an absent defendant does not appear or plead within the time allowed, the court may proceed as if the absent defendant had been served with process within the State, but any adjudication shall, as regards the absent defendant without appearance, affect only the property which is the subject of the action. When a part of the property is within another district, but within the same state, such action may be brought in either district.

Any defendant not so personally notified may, at any time within one year after final judgment, enter his appearance, and thereupon the court shall set aside the judgment and permit such defendant to plead on payment of such costs as the court deems just.

(28 U.S.C., 1958 ed., sec. 1655.)

U.S. GOVERNMENT PRINTING OFFICE:1964